



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta tad-9 ta' Ottubru, 2013

Appell Civili Numru. 46/2012

Marthese Said u l-Avukat Dottor Victor Scerri, zewgha

vs

L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar

Il-Qorti,

Rat ir-rikors tal-appell ta' Marthese Said u l-Avukat Dottor Victor Scerri tas-16 ta' April 2012 kontra d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tad-29 ta' Marzu 2012 fejn ikkonfermat ir-revoka tal-permess PA 7719/06 ai termini tal-artikolu 39A tal-Kap. 356 illum artikolu 77 tal-Kap. 504 a bazi ta' 'error on the face of the record';

Rat ir-risposta tal-Awtorita li ssottomettiet li l-appell ghandu jigi michud u d-decizjoni tat-Tribunal konfermata;

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Rat l-atti kollha u semghet id-difensuri tal-partijiet;

Rat id-decizjoni tat-Tribunal li tghid hekk:
Ikkunsidra:

Illi ghan-nom tal-appellanti, l-Avukat Franco Vassallo pprezenta l-aggravji taghhom kif gej:

“We act for Ms Marthese Said and her husband Dr Victor Scerri with reference to the decision of the Malta Environment and Planning Authority which was received on the s" October 2009 in order to file an appeal from the said decision. Since the decision was sent in the English language the appeal is being written in English.

The Decision appealed from.

The Authority at a meeting held on the 13th August 2009 considered development permit PA7719/06 and invoked Article 39A of the Development Planning Act.

The Authority revoked development permit PA 7719/06 since no appropriate assessment was carried out and this constituted an error on the face of the record.

Article 39A of Chapter 356.

39A. (1) The Authority may, only in the cases of fraud or where public safety is concerned or where there is on error on the face of the record, by order revoke or modify any development permission granted under this Act, stating in such order its reasons for so doing; and, prior to deciding to revoke or modify a development permission in terms of this subarticle, the Authority shall inform the person who will be affected by its decision of the date and time of its meeting where the Authority shall also hear the said person's submissions if the latter opts to attend.

Error on the face of the record' means an error an the face of a record which offends against the law

Application PA 7719/06 amendments to approved PA 6321/02

The application covered a request to increase the building footprint of the approved development in line with existing policies whereby extensions of permitted developments not exceeding 200sq metres in Outside Development Areas [ODZ] were acceptable.

This application was approved on the 19th September 2007 "in view of previous permit and within the area allowed by policy".

It is permit PA 7719/06 that was revoked by MEPA by a decision taken at a meeting held on the 13th August 2009.

Grounds for Appeal.

1. Nullity of the decision because the order dated 16th September 2009 received on the 8th October 2009 does not state the reasons why there is an error on the face of the record.

2. Without prejudice to the above if the reason lies on the omission by the Development Control Commission to refer the file to the Environmental Protection Directorate for an appropriate assessment under LN311 of 2006 prior to the decision to give consent then such a reason is incorrect and MEPA acted ultra vires because there is no such obligation at law or in fact;

3. Discrimination. Appellants were discriminated and singled out because of Dr V Scerri's public persona. No such action was ever taken over scores of developments of a similar nature.

4. Without prejudice to the above the revocation of a permit does not bring about the revocation of the application. In revoking the permit Mepa should have referred the matter back to the DCC for the requested assessment.

1. Nullity.

In examining the provisions of article 39A one must keep in mind that the power afforded by the legislator to the Authority is of an exceptional nature.

Consequently it must be exercised within the parameters of the law and according to the letter of the law.

In fact the elements required for the exercise of this power necessitate the existence of a decision and/or a planning permit which has been granted.

The revocation is made by means of an order, stating in such order its reasons for so doing; [Maltese version fil-waqt li taghti r-ragunijiet tagha ghal dik id-decizzjoni]

A cursory look at the revocation order herein attached as document A will illustrate, a lack of motivation, explanation or reason which led to the decision being delivered. It cannot be argued that the notice of the Authority's intention to proceed with a request for revocation is tantamount to or satisfies the requirements of the law because the letter dated 8th July 2009 is not an order by the Authority but a request by the Directorate for its revocation.

The Authority in deciding to apply the provisions of article 39A is acting in a quasi-judicial capacity and therefore further reference can be made to the interpretation of acts by applying the principles of civil procedure relating to nullity of judicial acts.

2. Incorrect application of Article 39A [Ultra Vires].

It is a generally accepted principle that the remedies contemplated by section 39A are extraordinary in nature and that they must only be used rarely and within the confines of the law.

A lax and reckless use of such extraordinary measures would erode the citizen's rights to have a fair reasonable process protected by and at law. If this is not the case MEPA would have the power to revoke any permit simply because it would be convenient to do so.

Therefore the application of article 39A should it is submitted be strictly and restrictively interpreted and applied.

The elements of article 39A require the existence of an error, which error must exist on the face of the record and offends the law. Therefore before the Authority can exercise this power one must first establish the following:

- The existence of an error;
- The error must be such that it is apparent on the face of the record;
- The error must offend the law.

The Authority further asserts that the error consisted in the omission by the Development Control Commission to refer the file to the Environmental Protection Directorate for an appropriate assessment under LN311 of 2006 prior to the decision to give consent.

In examining the planning process in question we note that notwithstanding a detailed report was presented by the case-officer [representing the Directorate] outlining, inter alia, the applicability of LN311 of 2006 at no stage did the case officer [or in any case, any of the consulted bodies] emphasize the necessity of a referral for an appropriate assessment.

A careful reading of article 19[1] of Legal Notice 311 of 2006 should illustrate that prior to referring a matter for an environmental assessment it must "appear" to the competent authority [Mepa] that such an assessment is required. In this case the competent authority[ies] namely the Planning Directorate and the Development Control Commission did not believe such an assessment was required because of the reasons listed in granting the permit.

It is fair to conclude therefore that MEPA is alleging that its' technical/advisory and decision making officials erred in their deliberations prior to the award of the permit and

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that therefore it "passed judgment on the acts or omissions of its' own organs."

Therefore in so far in that Mepa's decision is based on the allegation that the Development Control Commission erred in not asking for an impact assessment then such a decision is legally and factually wrong. The Development Control Commission has no such obligation since first it must appear to the Commission that such an assessment is required.

The Commission made a reasoned judgment and stated that it did not appear that an assessment was necessary at this stage because the application in hand covered an extension of an approved permit and not an application for development of pristine land.

Therefore objectively even if one does not agree with the judgment of the Commission one cannot state that the decision was one which was in error and which offended the law.

In order to justify the application of art 39A, the degree of error must be so blatant and so clear that it leaves no room for doubt. In this matter evidently Mepa merely disagreed [due to noises by the chattering class] with a decision taken objectively and reasonably. Clearly, the elements required for the implementation of a drastic remedy such as the application of section 39A were unwarranted and ultra vires.

As stated above, although no details are given in the decision revoking the permit, it seems that the error complained of consists in the Development Control Commission's decision not to ask for an assessment according to legal notice 311/06.

Therefore without prejudice to previous submissions it would be worthwhile examining the requirements listed by the said legal notice.

19. (1) Where it appears to the Competent Authority that an application for consent under these regulations relates to an operation or activity which is or forms part of a plan or project which>:

- (a) is not directly connected with or necessary to the management of the protected site, and
- (b) is likely to have a significant effect thereon, either individually or in combination with other plans or projects,

the Competent Authority shall make, or require the applicant to make, an appropriate assessment, of the implications of the operation or activity on the site in view of the site's conservation objectives.

The Board of Appeal should when examining this appeal with respect ask itself the following:

In deciding that no such assessment was required did the DCC act reasonably or was such a decision [not to refer] so wrong that the application of art 39A is justified?

In determining PA 7719/06 the DCC had the following circumstances before it:

- A case-officer's report that recommended a refusal but did not make reference to the requirement of an assessment;
- Previously approved permits covering the same site that had been processed, vetted and published in a regular manner;
- No objections by any environmental group or NGO;
- The application referred to an extension to an approved development;
- A plethora of previous decisions which allowed such a development.

In conclusion therefore did the DCC act unreasonably to such an extent that it erred in a manner that offended the law? Before any Court or Tribunal a judgment or decision is never put aside because the general public does not agree with it. For a judgment to be put aside it must be shown that the judgment goes against the principles of natural justice or is illegal. This with respect was never the case in this application.

Put simply the decision to revoke a legitimate decision was provoked by a public outcry which demanded action even if such action was irregular and manifestly illegal.

This alone renders Mepa's decision to revoke PA 7719/06 null and void.

3. Discrimination.

Appellants were discriminated against due to the negative publicity meted out and Dr Victor Scerri's public persona.

We will be submitting a list of development permits within Outside Development Zones where applications for developments of a similar or larger development were approved due to the accepted policy PLP 20 which was applied when determining PA 7719/06.”

Illi l-Awtorita' wiegbet kif gej:

“Illi fl-ewwel lok l-istess applikazzjoni saret minn Marthese Said meta l-istess skond l-I.D. card number hemm imnizzel jindika il-persuna bhala Marthese Scerri Said u l-Awtorita' titlob li jigi spjegat jekk kienx hemm xi raguni li ma tnizzilx l-isem taghha kif jidher fir-registru elettorali u l-1.D. card taghha. Dan stante li l-istess applikazzjoni fiha dikjarazzjoni li l-informazzjoni mgħotija hi korretta u hemm jurisprudenza kostanti tal-Qorti ta' l-Appell li zball fl-okkju jwaqqa' decizjoni;

Illi fil-mertu l-appell qed isir mill-kontestazzjoni ta' revokazzjoni taht l-artikolu 39A fuq diversi aggravji li kif ser jinghad rna għandhomx bazi legali w fatti mhux korretti:

1. Fl-ewwel lok qed jinghad li d-decizjoni ta' l-appellanti hi nulla stante li qed jinghad li ma ngħatax motivazzjoni, spjegazzjoni jew raguni kif wasslet l-Awtorita' għal tali raguni. Dan mhux minnu stante li l-ligi kull ma tghid hi li, apparti li tgharraf lill-applikant u thallih jippartecipa fil-laqgha fejn issir tali decizjoni (kif għamel fil-laqgha tat-13 ta' Awwissu, 2009, fejn kif ser jigi ppruvat immotivaw u

semghu l-argumentazzjoni kollha w taw ir-ragunijiet kollha ghaliex kienu u fuqhiex kienu ser jirrevokaw l-artikolu 39A), taghti r-ragunijiet ghal tali decizjoni w ir-raguni hija stante li "no appropriate assessment was carried out" w dan ukoll spjegatu li jaqa' taht il-parti kostituttiva tal-artikolu 39A u cjoe "zball f'dokument li jidher minn ezami ta' l-istess dokument";

Anki kieku tali raguni rna kellhiex tkun valida skont il-ligi ghax hi skjetta w "to the point", ma' l-aggravju l-appellant jaghmel referenza ghall-artikolu 469A (barra minn loku stante din taqa' biss taht il-gurisdizzjoni tal-Qorti u mhux tal-Bord ta' l-Appell dwar l-Ippjanar) u partikolarment ghall-principji ta' gustizzja naturali;

Illi jekk l-appellant fl-aggravju tieghu, fejn hawwad flimkien zewg kuncetti legali distinti, qed ifisser li ma nghatax dritt ta' smiegh xieraq jew proceduri mhux korretti, ma treggix stante inghata kull dritt li jippartecipa w iqajjem il-punti tieghu u xhieda ta' dan huma l-istess aggravji l-ohra li qajjem, fejn qed jattakka l-agrumentazzjoni li saret quddiemu meta gie deciz il-kaz. Fi kwalunkwe kaz kieku verament ikun hemm xi nuqqas, din ma jgibx nullita' izda jerga' jintbaghat lura biex ir-ragunijiet jingiebu iktar fid-dettal bi dritt ta' appell minn tali data, haga inutili stante kif diga' inghad, l-istess aggravji sussegwenti juru li jaf ben tajjeb x'kien l-izball;

2. It-tieni aggravju hu ibbazat fuq premessa hazina w cjoe' li l-artikolu 39A jista' jigi biss utilizzat f'kazi "straordinarji". Dan mhux minnu. L-istess jista' jigi irrevokat meta l-elementi hemm imsemmija jigu miksura. Daqshekk semplici.

Terga' issir premessa hazina meta jinghad li fil-kaz ta' "error on the face of the record" hu l-ommissioni i ma giex riferut taht l-avviz legali 311 ta' l-2006. Dan mhux korrett. Kif jidher car mill-minuti ta' l-istess Bord, skond l-avviz legali 114 ta' l-2007 dwar l-EIA, din kienet timponi li l-istess jaqa' taht il-parametri ta' EIA u taht l-istess parametri ta' l-EIA, skond l-avviz legali 311 ta' l-2006, l-istess kien jirrikjedi (stante li l-area kienet zona specjali ta'

konservazzjoni), kien jinhtieg evalwazzjoni ambjentali (stante, u zgur mhux kontestata li l-izvilupp ma kienx direttament (u lanqas f'ogni caso indirettament) konness ma' jew necessarju ghat-tmexxija ta' sit protett: Art. 19 (1) (a) ta' l-avviz legali);

Mhux korrett li jinghad li t-technical/advisory officials ta' l-Awtorita ma hassewx dan il-bzonn ghax ma talbuhx, ghax fl-istadju tad-direttorat l-istess ma kienx japplika stante li in vista ta' l-importanza tas-sit, l-esperti hassew li ghandu jigi "recommended for refusal" w inutili li taghmel EIA jew xi tip ta' evalwazzjoni meta qed jinghad li ghandu jigi rifjutat fuq il-mertu tieghu – l-artikolu 19 (1) ta' l-Avviz Legali 311 ta' l-2006 japplika fejn ikun ser isir il-kunsens - u hawn li kien hawn l-izball, kif jidher mid-dokumentazzjoni innifisha, li qed tikser din il-ligi – li l-Kummissjoni ghall-Kontroll ta' l-izvilupp hass li ghandu jaghmel overturning (vide min. 22 fil-file PA 7719/06, minghajr ma jaghti ragunijiet skont il-Kap. 356 ghaliex qed jaghmel overturning tar-ragunijiet tar-rifjut tad-direttorat u biss jghid "approved 4 - 1 i/v of previous permit and within the area allowed by policy") - l-izball li jmur kontra l-ligi hawn hu ovvju - f'dak l-istadju li hassew li seta' jghaddi, kellhom jaghdudh ghall-evalwazzjoni taht l-avvizi legali msemija, haga li ma saretx u hemm kellha qabel issir l-evalwazzjoni rikjesta mill-ligi jekk effettivament seta' johrog il-permess;

L-Awtorita' taqbel li kien hemm ultra vires izda mhux fl-applikazzjoni ta' l-artikolu 39A izda bl-ghoti meta ma gewx segwiti r-rekwiziti tassattivi fil-ligi;

Kull kummenti ohra ta' l-appellanti f'dan l-aggravju mhux il-mertu ta' l-appell u cjoe' tar-revoka taht l-artikolu 39A, izda dwar konsiderazzjonijiet fil-mertu kieku giet segwita l-procedura korretta;

3. It-tielet aggravju ta' l-appellant ta' diskriminazzjoni mhux fil-gurisdizzjoni tal-Bord kif ikkonfermat diversi drabi mill-Qorti ta' l-Appell, izda kaz tal-Qorti Kostituzzjonali, u del resto l-istess ma ngieb ebda prova ta' dan fl-appell miktub odjern. U anki kieku kellu jingieb, wiehed mhux ghandu jkompli jikser il-ligi izda jara jekk fil-kazi li messhom

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semwew fl-appell taghom (izda ma semwewx u l-Awtorita' ma tistax twiegeb ghal xi haga mhux imnizzla f'dan l-istadju), wiehed jara jekk ikunx japplika jew le l-artikolu 39A izda jhalli dan il-kaz impregudikat fl-applikazzjoni korretta ta' l-artikolu 39A;

4. Fl-ahhar aggravju tieghu, l-appellant jikkonkludi li r-revoka tal-permess ma setghetx gabet ir-revoka ta' l-applikazzjoni. Din ma treggix anzi l-Awtorita' issostni li din hi indirettament ammissjoni ta' l-appellant li hu naqas li jitlob lill-Awtorita' meta kien qed jikkontesta l-artikolu 39A li jekk sar l-izball dan ghandu jkompli mill-istadju ta' fejn sar l-izball - izda tali talba ma saritx. Anzi il-ligi taghmilha cara li dak li hu permissibbli taht l-artikolu 39A hi jew revoke jew tibdil ta' permess. Fil-kaz de quo, li giet revokata skont id-decizjoni kienet id-decizjoni inizjali w id-decizjoni moghtija taht it-39A kienet legalment korretta fil-fatt u fid-dritt u ma ngiebu ebda ragunijiet validi ghaliex l-istess revoke ghandha tigi annullata. “

Fis-seduta tal-14 ta' Lulju 2010, xehed il-Perit Robert Musumeci;

Hu ikkonferma li kien il-Perit inkarigat mill-appellanti dwar din l-applikazzjoni; li d-DPA report irrakkomanda refusal; hu pprezenta submissions u ttratta fil-laqgha mad-DCC, li ddecidiet li tapprova l-applikazzjoni. Il-Perit Musumeci ikkonferma li l-ewwel kien nghata permess PA 6321/02 li approva binja residenzjali fuq 150 m.k.

L-applikazzjoni PA 7719/06 kienet intiza biex tkabbar l-area minn 150 sq.m. ghall-200 sq.m. Il-perit ikkonferma li DCC ha konjizzjoni ta' kull ma kien hemm fid-DPA report inkluz l-Avviz Legali 311/06.

Ra l-ittra tal-Awtorita' tas-16 ta' Settembru 2009 pprezentat mill-appellanta fil-15 ta' Lulju 2010:

“Dear Ms Said,

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Re: PA 7719/06 - Amendments to approved permit PA 6321/02 (to rehabilitate dwelling), site at Wied Tal-Marsa, l/o Bahrija, Rabat

The MEPA board at its meeting held on 13 August, 2009 considered development permit PA 7719/06 and invoked Article 39A of the Development Planning Act.

The Authority revoked development permit PA 7719/06 since no appropriate assessment was carried out and this constituted an error all the face of the record.

In line with Article 39A(3) you shall have a right to appeal, the Authority's decision, to the Appeals Board within 30 days [rom the date of service of this Revocation Order.”

Ra t-traskrizzjoni tax-xhieda tal-Perit Philip Azzopardi, li xehed fis-seduta tal-20 ta' Ottubru 2010;

Ix-xhud ikkonferma li hu kien ic-chairman tad-DCC u mill-minuta fil-file jidher li ttiehed vot.

Il-minuta tghid “approved 4-1 in view of previous permit and within the area allowed by policy.” Mistoqsi, billi dan kaz ta' ‘overturning’, nghatawx ragunijiet kif tirrikjedi l-ligi hu rrisponda “Ahna deherilna li jekk nghati dik ir-raguni kienet bizzejjed ghar-ragunijiet kollha, u kienet sufficjenti”. Mistoqsi jekk ittiehidx kont tal-fatt li s-sit kien “within a special area of conservation of international importance” u “Natura 2000 Site” – irrisponda li ttiehdet dik id-decizjoni billi l-area kienet diga ‘committed’.

Ra x-xhieda ta' Alex Camilleri, Manager, Environmental Assessment Unit (MEPA), li xehed fis-seduta tal-15 ta' Frar 2011, u tat-12 ta' Lulju 2011;

Hu ikkonferma li r-rakkomandazzjoni tal-Ambjent kienet rifjut; u rrefera ghall-memo Blue 12 fil-PA file;

Ix-xhud ikkonferma li s-site hi go area skedata Special Area of Conservation, qrib il-wied tal-Bahrija u hi Natura 2000 site.

Hu kkonferma li skond l-Avviz Legali 257 tal-2003 u sussegwentement l-Avviz Legali 311 tal-2006, qabel ma zvilupp ikun approvat, jinhtieg li jsiru approfondimenti teknikament imsejha 'appropriate assessment' valutazzjoni li torbot mal-Habitats Directive.

Billi rrizulta li hareg il-permess minghajr ma saru dawn l-approfondimenti u minghajr ma sar l-assessment mehtieg, id-Direttorat irrakomanda r-revoka taht l-Artiklu 39A. Il-kwistjoni kienet limitata ghall-estensjoni cioe' PA 7719/04.

Ix-xhud irrefera ghad-Dokument AC1 li huwa l-'workings' tad-Direttorat li bih wasal ghal konkluzjoni li kien mehtieg 'appropriate assessment' u billi dan ma sarx, skattat l-kwistjoni ta' irregolarita' u procedura vizzjata u ghalhekk r-rakkomandazzjoni ghar-revoka.

Ix-xhud ddikjara li meta hareg il-permess PA 6321/02 ma kienx mehtieg l-appropriate assessment;

Mistoqsi in kontro-ezami li meta d-DCC approvat l-applikazzjoni, ddecidiet li ma kienx hemm bzonn 'environmental assessment' irrisponda li ma jirrizultax li d-DCC "dahal f'dawn il-merti". Hu kkonferma li qed isir ezercizzju ta' xi permessi hargu fi 'special areas of conservation'.

Ikkunsidra ulterjorament :-

Fl-applikazzjoni PA 7719/06 ipprezentata fis-7 ta' Dicembru 2006, paragrafu 18 – Previous applications permits etc on site, l-applikant elenka s-segwenti permessi :- PA 2835/00 – to reconstruct the existing structures with very minor alterations to facilitate use; PA 6321/02 – to rehabilitate dwelling u PA 5846/04 – to delete condition 3 in order to conform with condition 1 in PA 6321/02.

It-tlett ritratti annessi mal-applikazzjoni – Red 1A juru struttura ruruali antika f'kundizzjoni prekarja.

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Id-Development Planning Application Report (DPAR) Blue 20 fil-file PA 7719/06 irrakkomanda refusal u elenka tmin (8) regunijiet.

Fl-istess rapport is-sit gie hekk deskritt “the area in question is scheduled as an Area of Ecological Importance and site of scientific importance (L.N. 68/96, L.N. 444/95 u LN 400/96) Area of Archeological Importance (LN 278/98) and a Special Area of Conservation 9LN 311/06)”

“Site lies within a very sensitive area and proposal would significantly impact not only on the Environmental characteristics dominated by Wied tal-Bahrija/ Wied tal-Marga System in terms of intensification of land use but would also counter the objective by the rural policies and scheduling.”

Id-DCC pero' kif jirrizulta minn minute 22, approvat l-applikazzjoni – “approved 4-1 in view of previous permit and within the area allowed by Policy”.

Il-permess igib id-data tas-16 ta' Jannar 2008 Red 33 fil-file PA 7719/06.

B'ittra tat-8 ta' Lulju 2009, Martin Seychell, Direttur, Environment Protection Directorate informa lill-appellanti li l-permess hareg in kontravvenzjoni tar-Regolament 19(1) tal-Avviz Legali 311 tal-2006 – Flora, Fauna and Natural Habitats Protection Regulations 2006 billi l-proposta kienet tirrikjedi ‘appropriate assessment tal-implikazzjonijiet tal-progett fuq is-sit, qabel ma l-applikazzjoni tista' tigi approvata – u billi dan ma sarx, hemm lok ghar-revoka tal-permess skond l-Artiklu 39A tal-Kap. 356.

L-Avukat Dr. Franco Vassallo ghall-appellanti ikkontesta din id-decizjoni b'ittra tad-29 ta' Lulju 2009 – Red 69.

L-appellanti u l-konsulenti taghha gew mistiedna jattendu ghall-laqgha tal-MEPA Board tat-13 ta' Awwissu 2009,

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fejn kienet ser tittiehed decizjoni dwar ir-revoka tal-permess PA 7719/06.

Mill-minuti ta' din il-laqgha – Red 71 et.seq, jirrizulta li saret diskussjoni mal-partijiet u finalment ittiehdet decizjoni li rrevokat il-permess b'dan li l-applikazzjoni kellha terga' tirriverti ghall-istadju ta' processar billi jsir 'appropriate assessment'

Din id-decizjoni giet kkomunikata lill-applikanti b'ittra tas-16 ta' Settembru 2009. L-appell prezenti hu l-appell mid-decizjoni hemm imsemmija.

Skond l-Artiklu 39A tal-Kap. 356, l-Awtorita' tista' tirrevoka jew timmodifika permess moghti f'kazijiet ta' frodi, sahha pubblika jew zball 'error on the face of the record which offends against the law.'

L-Artiklu 39A tal-Kap. 356 gie revokat b'effett mit-30 ta' Novembru 2010 – Avviz Legali 512 tal-2010; Dan gie sostitwit bl-Artiklu 77 tal-Kap. 504 li dahal fis-sehh fl-istess gurnata 30 ta' Novembru 2010 – Avviz Legali 511 tal-2010; li hu prattikament identiku ghall-Artiklu revokat. L-Artiklu jimponi l-obbligu fuq l-Awtorita' li tinforma l-persuna koncernata f'dan il-kas l-applikanti, bil-laqgha fejn l-istess parti tinghata l-apportunita' li tattendi u taghmel is-sottomissjonijiet taghha.

Minn ezami tal-file PA 7719/06 jirrizulta li din il-procedura giet korrettement segwita.

Il-mertu

Il-kwistjoni principali li trid tigi determinata f'dan il-kas hi jekk sarx zball fit-termini tal-Ligi meta d-DCC wara li ghazlet li ma taqbilx mar-rakkomandazzjoni, li fir-rapport tad-Direttorat kienet 'to refuse' – kellhiex f'dak l-istadju, cioe' qabbel ma tiddeciedi li tapprova l-applikazzjoni, tirrinviya l-process biex issir 'appropriate assessment' u tipposponi d-decizjoni taghha dwar l-applikazzjoni, wara li tkun rat dan ir-rapport u skond l-kontenut tal-istess rapport.

Id-DPA report – Blue 20 fil-file, hu rapport dettaljat u jindirizza ezawrjentement l-kwistjonijiet kollha rilevanti ghal din l-applikazzjoni, Ir-rapport in fatti jikkumenta fuq is-sit 'de quo'; fuq s-site constraints, is-site planning history, fejn nghataw dettalji tal-applikazzjonijiet precedenti; Planning context cioe' l-polcies tal-Pjan ta' Struttura, rilevanti ghal din l-applikazzjoni; il-Pjan Lokali publikat f'Lulju 2006; Special Area of Conservation u Natura 2000 site; PLP 20 zvilupp barra z-zona ta' zvilupp; l-Avviz Legali 258 tal-2003 u jikkonkludi b'rakkomandazzjoni ghal rifjut tal-applikazzjoni motivat fuq (8) tmien ragunijiet. L-ahhar motivazzjoni tar-rifjut numru 8 tghid hekk:-

“The site is located within a special Area of Conservation of International Importance. The proposed development is not necessary to the management of Special Area of Conservation. The proposal is therefore unacceptable as it conflicts with Article 13.1 of the Legal Notice 257 of 2003”.

Ir-regolament 13 tal-Avviz Legali 257 tal-2003 jimponi l-procedura tal-‘appropriate assesement’.

Skond ir-regolament 19(1) tal-Flora, Fauna and Natural Habitats Protection Regulations 2006 Avviz Legali 311 tal-2006, hu mehtieg ‘appropriate assessment’ qabel l-awtorizzazzjoni ta' zvilupp fi Special Area of Conservation ghal:

“any operation or activity which is or forms part of a plan or project which:

a. is not directly connected with or necessary to the management of the protected site

and

b. is likely to have a significant effect thereon, either individually or in combination with other plans or projects.”

Din l-applikazzjoni ma kienitx tirreferi għall-management tal-protected area; għalhekk kien necessarju li wiehed jistabilixxi jekk il-proposta kemm-il darba kellha tigi approvata, kienx ser ikollha effett signifikanti fuq l-area protetta u f'dak il-kas qabel ma tigi determinata l-applikazzjoni kien mehtieg 'appropriate assessment'.

Hi l-fehma kunsidrata ta' dan it-Tribunal li l-Kummissjoni għall-Kontroll tal-Izvilupp (DCC) meta għazlet li ma taqbilx mad-DPAR 'to refuse', ma kellhiex u ma setgħetx tghaddi biex immdejatament tiddeciedi finalment l-applikazzjoni. Billi s-sit in kwistjoni, hu ta' importanza singolari, cirkostanza ampjamnet emfasizzata fl-istess rapport li certament giet notata mill-Kummissjoni, din kellha l-obbligu li skond r-regolament 19(1) tal-Avviz Legali 311 tal-2006, tipposponi tali decizjoni, tordna li jsir 'screening' permezz ta' 'appropriate assessment' u tipprovdi finalment fuq l-applikazzjoni wara li tkun rat tali assessment.

Fic-cirkostanzi partikolari, l-appell ma jimmeritax kunsiderazzjoni favorevoli.

It-Tribunal għalhekk qed jiddisponi minn dan l-appell, billi jichad l-istess jikkonferma d-decizjoni tal-Awtorita' tat-13 ta' Awwissu 2009, komunikata lill-applikanti b'ittra tas-16 ta' Settembru 2009, b'dana illi r-revoka hi limitata għall-applikazzjoni PA 7719/06.

Ikunsidrat

L-aggravji tal-appellanti huma s-segwenti:

1. It-Tribunal injora l-aggravju tal-appellant illi d-decizjoni tad-DCC meta gie approvat il-permess lli ma jibghatx il-proposta għal screening permezz ta' appropriate assessment kien diskrezzjonali a bazi tal-artikolu 19(1) tal-Avviz Legali 311 tal-2006, u minflok addotta l-opinjoni tal-Awtorita li d-DCC kellha tagħmel dan l-iscreening minhabba n-natura tal-izvilupp. Kwindi jsegwi li ma jistax jinghad li kien hemm zball fid-decizjoni tad-DCC liema zball skond l-artikolu 39A irid jirrizulta minn document lli joffendi l-ligi cioe mid-decizjoni stess u mhux mill-operat

ta' diskrezzjoni amministrativa kif qed jigi impostat il-gustifikazzjoni ghar-revoka da parti tal-Awtorita;

2. It-Tribunal naqas li jiddeciedi zewg aggravji cioe (a) li l-avviz ta' revoka tas-16 ta' Settembru 2009 ma kienx skond il-ligi ghax nieqes minn motivazzjonijiet rikjesti mill-ligi ad validatatem, u (b) r-rimedju ahhari f'kaz li l-appell jigi respint hu li l-process jintbaghat lura fi stadju ta' processar wara li ttiehdet id-decizjoni tad-DCC.

L-ewwel aggravju

Dan l-aggravju espress b'mod elokwenti u studjat mill-appellant, fl-opinjoni tal-Qorti ma jisthoqqlux jigi milqugh. Il-bazi ta' dan l-aggravju jistrieħ fuq l-applikazzjoni tal-artikolu 19(1) tal-Avviz Legali 311 tal-2006. L-appellanti jikkontendu illi qari ta' dan l-artikolu juri illi l-kliem uzat mill-ligi hi

Meta, fl-opinjoni ta' l-Awtorità Kompetenti, applikazzjoni għall-kunsens magħmula taht dawn ir-regolamenti, tikkonċerna operazzjoni jew attività li hi, jew tiffirma parti minn pjan jew proġett li:

(a) m'huwiex direttament konness ma' jew neċessarju għat-tmexxija ta' sit protett, u

(b) x'aktarx ikollha effett sinifikanti fuqha, kemm individwalment kemm flimkien ma' pjanijiet jew proġetti ohra,

l-Awtorità Kompetenti għandha tagħmel, jew tobbliga lill-applikant biex jagħmel, evalwazzjoni adatta,

L-appellanti qed isostnu illi t-Tribunal naqas li jindirizza l-kwistjoni dwar id-diskrezzjoni tal-Awtorita cioe d-DCC (l-id eżekuttiva tal-Awtorita), u minflok assumu li l-Awtorita kellha obbligu tagħmel dan.

Harsa lejn id-decizjoni tat-Tribunal pero juri li dan mhux apprezzament korrett ta' dak deciz. Hu minnu illi t-Tribunal naqas li jattakka b'mod dirett dan l-aggravju pero qari tad-decizjoni tieghu juri l-hsieb tat-Tribunal illi kull diskrezzjoni tal-Awtorita kienet imxekkla mill-fatti stess li kellu

quddiemu. It-Tribunal fil-fatt semma' illi r-rapport tad-direttorat indika l-policies applikabbli fil-kuntest ta' planning context. Dawn kienu l-Pjan Lokali ta' Lulju 2006; Special Area of Conservation u Natura 2000 site; PLP 20 zvilupp barra zona ta' zvilupp u Avviz Legali 257 tal-2003 imsemmija bhala wahda minn tmien ragunijiet ta' rifjut skond id-direttorat.

Skond it-Tribunal, id-DCC rinfaccjat b'dan ir-rapport u senjatament il-policies applikabbli ma setghax jiddeciedi favur il-proposta bla ma jottempera ruhu mill-imsemmi Avviz Legali. Kwindi dak li qal it-Tribunal hu effettivament illi l-poter diskrezzjonali tad-DCC ma kienx applikabbli meta l-fatti kienu tali li biex japprova l-permess kien jehtieg 'appropriate assessment'. Dan intqal fil-kuntest ta' decizjoni tal-istess DCC li ma mmotivatx ir-raguni ghall-approvazzjoni izda biss 'approved 4.1 in view of previous permit and within the area allowed by the policy'.

Din il-Qorti tifhem illi dak li fil-fatt indirizza t-Tribunal kienet ir-ragonevolezza tal-uzu ta' diskrezzjoni fdata lill-Awtorita permezz tad-DCC fl-applikazzjoni o meno tal-artikolu 19(1) tal-Avviz Legali 311 tal-2006. Di fatti l-applikazzjoni o meno ta' dan l-Avviz Legali insorga meta d-DCC qaleb ir-rapport tad-direttorat ghal rifjut tal-applikazzjoni ghal wiehed ta' approvazzjoni. F'dak il-hin skattaw indoli procedurali legali li d-DCC kellu jikkunsidra u josserva, u dan peress illi r-raguni tal-approvazzjoni ma kinitx innegazzjoni fuq bazi legali tar-rapport tad-direttorat izda biss ghaliex gia kien hemm zvilupp fuq is-sit. La darba pero baqghu jissuistu certi policies fil-konfront tal-izvilupp, id-DCC kellha tottempera ruhha magghom.

Billi kull diskrezzjoni amministrativa trid tigi ezercitata fil-limiti tal-ligi u b'mod ragonevoli, f'dan il-kaz din id-diskrezzjoni intuzat bla raguni spjegata jew deliberata dwar dak li jrid l-artikolu 19 tal-Avviz Legali 311 tal-2006, u ghalfejn semmai dan l-artikolu ma kienx applikabbli biex tigi gustifikata n-nuqqas ta' ottemperanza mal-imsemmi artikolu.

Dan iwassal ghal konsegwenza illi l-artikolu 39A gie applikat b'mod tajjeb mill-Awtorita billi d-decizjoni tad-DCC kienet tippekka minn motivazzjoni gustifikata a bazi tad-diskrezzjoni afdana lilha li tonqos milli taghmel u tordna assessment tenut kont tas-sit u z-zona fejn jinsab. La darba ma saret ebda gustifikazzjoni, kellhom japplikaw il-mizuri idoneji biex l-izvilupp ikun jista' jigi approvat u dan a bazi ta' dak li kellu quddiemu d-DCC senjatament l-istat fattwali u legali tas-sit in kwistjoni. Kwindi l-zball fid-dokument hu fil-fatt l-izball mhux fl-uzu tad-diskrezzjoni, izda n-nuqqas tad-decizjoni li tottempera ruhha mal-ligi u policies vigenti meta ma ngiebet ebda raguni ghaliex dan ma kienx jew ma kellux isir. Dan kien zball f'decizjoni li jmur kontra l-ligi.

Ghalhekk dan l-aggravju ma jistax jigi milqugh.

It-tieni aggravju

Dan l-aggravju wkoll ma ghandux jigi milqugh ghaliex fil-waqt li hu minnu illi d-decizjoni komunikata bl-ittra tas-16 ta' Settembru 2009 tghid illi r-revoka tal-permess qed issir peress li ma sarx assessment tas-sit u ghalhekk hemm zball fl-atti. Din l-ittra inharget wara li saret seduta mill-partijiet involuti in segwitu ghall-ittra tat-8 ta' Lulju 2009 mibghuta lill-appellanti fejn gie spjegat b'mod dettaljat ghaliex kien qed jigi invokat l-artikolu 39A ghar-revoka tal-permess ezistenti. Din l-ispjegazzjoni dettaljata kienet tinvolvi l-kwistjoni fuq hiex gie revokat il-permess u dan kif inghad wara li l-appellanti nghataw terminu jirrispondu bil-miktub u saret laqgħa biex isiru s-sottomissjonijiet u d-dibattitu fuq il-kwistjoni.

Ghalkemm it-Tribunal ma jiddeciedix l-aggravju billi jieħdu b'mod specifiku f'kap ghal rasu, pero qari tad-decizjoni juri illi t-Tribunal ha konjizzjoni tal-fatti kollha u l-iter li wassal ghar-revoka bl-avviz tas-16 ta' Settembru 2009 u kkonkluda li l-procedura giet segwita korrettement. Ghalkemm il-Qorti kienet tkun aktar sodisfatta li kieku t-Tribunal uza kliem aktar car u inekwivoku pero d-dicittura wzata ma thallix dubju illi l-aggravju gie indirizt u skartat.

Kopja Informali ta' Sentenza

Din il-Qorti ma tqis li kien hemm xi nuqqas sostanzjali lil jimmerita li l-ewwel parti ta' dan l-aggravju jigi milqugh.

Mhux l-istess jinghad ghat-tieni parti tal-aggravju fejn it-Tribunal cahad l-appell tal-appellanti bla riservi. It-Tribunal stess fil-pagna 11 tad-decizjoni tieghu jirreferi ghal minuta tal-laqgħa tat-13 ta' Awwissu 2009 numru 71 et seq. qabel ittiehdet id-decizjoni ta' revoka fejn jintqal li ghalkemm il-permess kellu jigi revokat, l-applikazzjoni kellha tirriverti għall-istadju ta' pprocessar billi jsir appropriate assessment.

Dan jidher li sfugga lit-Tribunal li cahad l-appell u ghalkemm ikkonferma d-decizjoni tal-Awtorita tat-13 ta' Awwissu 2009, ma regax irrinviya l-atti lil Awtorita biex isir l-assessment li t-Tribunal jidhirlu li kellu jsir fic-cirkostanzi.

Dan in-nuqqas jagħti incertezza lil gudikat li hu censurabbli u qed jigi milqugh.

Decide

Għalhekk il-Qorti fil-waqt li tichad l-ewwel aggravju u l-ewwel parti tat-tieni aggravju, qed tilqa' t-tieni parti tat-tieni aggravju, u fil-waqt li tikkonferma in parti d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tad-29 ta' Marzu 2012, tirriformaha f'dik il-parti biss fejn it-Tribunal cahad l-appell mingħajr ma rrinviya l-atti lura lil Awtorita biex isir appropriate assessment u għalhekk in linea ma' dak deciz, il-Qorti tirrinviya l-atti lit-Tribunal limitatament għal prosegwiment tal-applikazzjoni PA 7719/06 biex isir appropriate assessemnt skond ma joghghbu jindika t-Tribunal u jerga' jsir apprezzament mill-gdid tal-applikazzjoni PA 7719/06. Spejjez jithallsu zewg terzi mill-appellanti u terz mill-Awtorita.

< Sentenza Finali >

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Pagna 21 minn 21

Qrati tal-Gustizzja